IN THE

Supreme Court of the United States

October Term, 1978

No. 78-721

ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT
For Appellants Quern and O'Malley

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago Illinois 60601 (793-3500),
Attorney for Appellants,
Quern and O'Malley.

PAUL J. BARGIEL,
PATRICIA ROSEN,
Assistant Attorneys General,
160 North LaSalle Street, Suite 800
Chicago, Illinois 60601 (793-5635)
Of Counsel.

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No. ——

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JURISDICTIONAL STATEMENT

Appellants Arthur F. Quern and Vivian O'Malley appeal from the final judgment of a three-judge court in the United States District Court for the Northern District of Illinois, Eastern Division. Appellants respectfully submit this Statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the district court has not yet been reported. The opinion of the court and its judgment order are reprinted herein at Appendices A & B.

JURISDICTION

Appellees brought this class action under 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. § 1983, seeking to have the district court declare invalid and enjoin the appellants from enforcing the Illinois Attachment Act, on the ground that the procedures provided for by that Act deprived appellees of their property without due process of law in violation of the fourteenth amendment to the United States Constitution. A three-judge court, convened pursuant to 28 U.S.C. §§ 2281 and 2284, entered its judgment on December 15, 1975, granting appellees the relief sought.

This judgment was vacated in *Trainor* v. *Hernandez,* 431 U.S. 434, 52 L. Ed. 2d 486, 97 S. Ct. 1911 (1977) and this Court remanded the case to the district court. On remand, the district court held that plaintiffs were not afforded an opportunity to present their federal claims in the pending state proceeding. The three-judge court entered judgment for the plaintiffs on August 1, 1978.

Appellants Quern and O'Malley filed their Notice of Appeal in the district court on September 18, 1978, a copy of which is reprinted at Appendix C. Jurisdiction of the Supreme Court of the United States to review this case by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of this Court to review this judgment on direct appeal:

MTM, Inc. v. *Baxley,* 420 U.S. 799, 43 L. Ed. 2d 636, 95 S. Ct. 1278 (1975);

United States v. *Georgia Public Service Commission,* 371 U.S. 285, 9 L. Ed. 2d 317, 83 S. Ct. 397 (1963).

STATUTE INVOLVED

The Illinois Attachment Act, Illinois Revised Statutes 1974, Chapter 11, is reprinted at Appendix D.

QUESTIONS PRESENTED

1. Whether the district court should have abstained from interfering with a pending state court proceeding under the principles of *Younger* v. *Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975).

2. Whether the procedures provided by the Illinois Attachment Act, Ill. Rev. Stat., 1977, ch. 11, afford appellees due process of law.

STATEMENT OF THE CASE

Appellees brought this class action in the district court challenging the constitutionality of the Illinois Attachment Act (reprinted at Appendix D), after the State of Illinois, on the relation of the Illinois Department of Public Aid, instituted attachment proceedings against them in the Illinois courts. A three-judge court was designated, pursuant to 28 U.S.C. § 2284, on March 21, 1975. The court entered judgment for plaintiffs, finding the Illinois Attachment Act unconstitutional, on December 15, 1975. Appellants appealed that decision to this Court, which vacated the decision and remanded the case to the district court to consider the question of whether appellees were afforded an adequate opportunity to present their federal claim to the state court in the pending state proceeding. *Trainor* v. *Hernandez*, 431 U.S. 434, 52 L. Ed. 2d 486, 97 S. Ct. 1911 (1977).

On remand, the district court found that appellees were not afforded an opportunity to present their constitutional challenge to the validity of the Illinois Attachment Act to the state courts in the pending state court proceeding. Judgment for the plaintiffs was entered on August 1, 1978, reinstating the Order which was entered on December 15, 1975.

ARGUMENT

I.

THE PRINCIPLES OF *YOUNGER* V. *HARRIS* AND *HUFFMAN* V. *PURSUE, LTD.* REQUIRE THAT THIS SUIT BE DISMISSED.

In *Trainor* v. *Hernandez*, 431 U.S. 434, 52 L. Ed. 2d 486, 97 S. Ct. 1911 (1977), this Court held that the principles of *Younger* v. *Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 42 L. Ed. 2d 482, 95 S. Ct. 1200 (1975) were broad enough to apply to interference by a federal court in an ongoing civil enforcement action brought by the State in its sovereign capacity. However, this Court expressly refused to rule on the question of whether the appellees could have presented their federal due process challenge to the Illinois Attachment Act (Ill. Rev. Stat., 1977, ch. 11, § 1 *et seq.*) in the pending state proceeding (*Trainor*, 431 U.S. 447, 52 L. Ed. 2d 497).

On remand, the district court held that appellees were not afforded an opportunity to present a constitutional challenge to the Attachment Act in the summary proceeding. Further, they found that the state court procedures, in which appellees would not be automatically afforded an immediate appeal of an order upholding the constitutionality of the state statute, did not afford appellees a plain, speedy, and efficient remedy for their federal claim. (The decision of the district court is reprinted in full herein at Appendix A). Consequently, the district court once again intervened to declare the Illinois Attachment Act unconstitutional. It is submitted that this decision fails to accord a proper respect for a state function under the principles of equity, comity

and federalism underlying this Court's decisions in *Younger* and *Huffman*.

In *Younger* this Court recognized that federal courts must not interfere with pending state court proceedings "unless it *plainly appears* that [the state court proceeding] would not afford adequate protection." (401 U.S. at 45, 27 L. Ed. 2d at 676) (emphasis added). In order to invoke *Younger* abstention, all that is required is that defendants are afforded "an opportunity to present their federal claims in the state proceedings". *Juidice* v. *Vail*, 430 U.S. 327, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977). It is submitted that the Illinois court system afforded appellees an opportunity to fully litigate their federal claim in the attachment proceeding which was pending at the time they filed suit in the federal court.

A.

Appellees Were Afforded An Opportunity To Present Their Federal Claims To The State Court In The Pending Proceeding.

Although the Illinois Attachment Act does not expressly provide for constitutional challenges to its validity, Illinois decisional law indicates that such challenges are unquestionably proper. In *Rosewood Corp.* v. *Fisher*, 46 Ill. 2d 249, 263 N.E. 2d 833 (1970), consolidated appeals were prosecuted from judgments for possession under another summary remedy, the Illinois Forcible Entry and Detainer Act (Ill. Rev. Stat., 1967, ch. 57). The distinctive and limited purpose of the Forcible Entry and Detainer Act is to permit persons entitled to possession of lands to be restored thereto. (*Rosewood*, 263 N.E. 2d at 835). The Act provided, in pertinent part, that:

> The defendant may under a general denial of the allegations of the complaint give in evidence any matter in

> defense of the action. *No matters not germane to the distinctive purpose of the proceeding shall be introduced* . . . (emphasis added). Ill. Rev. Stat., 1969, ch. 57, § 5.

Despite the foregoing language, apparently limiting defenses to questions relating exclusively to possession of the realty, the Supreme Court of Illinois in *Rosewood* held that defendant could raise challenges to the constitutional validity of the Act in the summary proceeding itself. Noting that section 11 of the detainer Act provided that the rules of practice and pleading in other civil cases applied to detainer actions, the Illinois Supreme Court held,

> ***The fusion of the practice and procedure in suits at law and in equity accomplished by the Civil Practice Act is, in our opinion, sufficient to permit necessary equitable relief in these proceedings, rather than to force upon defendants a separate proceeding where the same relief would be forthcoming. (*Rosewood,* 263 N.E. 2d at 838-39).

Similarly, in the instant case, § 26 of the Attachment Act makes the provisions of the Civil Practice Act applicable to attachment proceedings. Accordingly, it cannot be disputed that the Illinois courts would allow appellees to raise constitutional challenges to the validity of the Attachment Act in the summary proceedings under the holding of the Illinois Supreme Court in *Rosewood.* See also: *Hamilton Corp.* v. *Alexander,* 53 Ill. 2d 175, 290 N.E. 2d 589 (1972).

While the precise nature of any inquiry into the validity of the summary procedures embodied in the Illinois Attachment Act which would be made by the state courts is unclear, it is apparent that an inquiry consistent with the constitutional standard is afforded by the state proceedings. The authorities cited by the district court as support for its decision to intervene in the pending state court proceeding are plainly inapposite.

In *Caulder* v. *Durham Housing Authority,* 433 F. 2d 998, 1002 (4th Cir. 1970) the plaintiff had filed a notice of appeal from the decision of the magistrate in the ejectment proceedings, but was unable to perfect the appeal because he was financially unable to post the bond which was required, and there were no statutory provisions for a waiver of the bond. Therefore, the Court concluded that the state proceedings did not afford an opportunity to fully litigate the federal claims which were presented. (*Id.*) Consequently, the federal court concluded that an individual's right to fully litigate his federal claim in the state proceeding was "more theoretical than real."

In contrast, appellees in the instant case never attempted to present their federal claim in the context of the pending state proceeding. Consequently, it has not been demonstrated that the state forum is inadequate. In fact, state decisional law indicates that appellees would be afforded an adequate opportunity to litigate any constitutional challenges which they choose to raise.

Likewise, the Court's reliance on *Owens* v. *Housing Authority of City of Stamford,* 394 F. Supp. 1267, 1270-71 (D.C. Conn. 1975) is inappropriate. In *Owens* the federal court intervened because the defendants were not permitted to present their constitutional challenges to the validity of the state statute in the state proceedings, although they had attempted to do so. Therefore, the federal court found that intervention was warranted. No basis for such a decision exists in the instant case.

Similarly, the district court's reliance on *Doe* v. *Maher,* 414 F. Supp. 1368, 1374 (D.C. Conn. 1976) is misplaced. In *Maher* the Court's decision to intervene was based upon the fact that the case involved substantial federal questions —such as the interpretation of a federal statute and preemption under the supremacy clause of the United States

Constitution (U.S. Const. art. VI, cl. 2). The instant case, however, involves no such federal questions requiring the exercise of jurisdiction by the federal court. This matter merely involves a due process challenge to the validity of a state statute—a question which the Illinois courts are certainly competent to handle.

The district court also relies upon *Lessard* v. *Schmidt*, 413 F. Supp. 1318 (E.D. Wisc. 1976) for the proposition that a federal court will intervene where there is a "questionable right to appeal." While the Court in *Lessard* did cite this as support for its decision to intervene, the primary holding of *Lessard* was that the facts of the case did not present a situation requiring abstention under this Court's decision in *Huffman* because "although the State is a party to civil commitment proceedings, these proceedings are neither in aid of nor closely related to any state interests underlying its criminal justice system." (473 F. Supp. at 1320). See also: *United States General, Inc.* v. *Arndt*, 417 F. Supp. 1300, 1309 (E.D. Wisc. 1976). Since this Court has already found that the instant case does come within the ambit of *Huffman*, these holdings do not afford substantial support for federal intervention in this case.

In summary, in each of the cases relied upon by the district court as support for its decision to intervene, the plaintiffs in the federal suit had demonstrated that the state remedy was inadequate. However, no similar reason for intervention exists in the instant case. Illinois decisional law plainly indicates that the state courts will allow litigants to raise constitutional challenges to the validity of summary remedies in the summary proceeding. Therefore, the district court's decision to intervene in the instant case at this time was plainly an unwarranted interference in the ongoing state litigation.

B.

The Pending State Proceeding Afforded Appellees A Plain, Speedy, And Efficient Remedy For Their Federal Claim.

Had appellees presented their federal claim to the state court, it is clear that this court system would have afforded them an adequate forum in which to litigate their constitutional challenge to the state statute. Upon being served with a writ of attachment, appellees had an opportunity to immediately file a motion to quash the attachment based upon the unconstitutionality of the Act under Illinois Supreme Court Rule 184 (Ill. S.C.R. 184). Should this motion be sustained, this would be a final order from which the plaintiff could have taken an appeal under § 40 of the Attachment Act. A case which exemplifies this is *Olympic Forest Products, Inc.* v. *Chaussee Corp.*, 82 Wash. 2d 418, 511 P. 2d 1002 (1973). In *Olympic* the trial judge allowed defendant's motion to quash and dissolve the writ of garnishment, and plaintiff appealed. The Supreme Court of Washington affirmed the Order of the trial court, finding that the state statute permitting prejudgment garnishment of property without notice or prior hearing was violative of the procedural due process guarantees of the federal and state constitutions. (511 P. 2d at 1012).

Assuming, however, that the trial court would deny appellees' motion to quash the writ of attachment, this order would be an interlocutory order, and, therefore, no absolute right to an immediate appeal of such an order would exist. However, an immediate appeal would still be available either pursuant to Illinois Supreme Court Rule 308 (interlocutory appeals), or pursuant to Illinois Supreme Court Rule 304 (appeals from final judgments as to fewer than all claims). The Illinois procedural rule against automatic

interlocutory appeals was designed to prevent piecemeal appeals, not to prevent litigants from expeditiously presenting, to the Appellate courts, questions which would obviate the need for further proceedings in the trial court. It is exactly this type of question which should be the subject of an immediate interlocutory appeal. For example, in *Dep't. of Mental Health* v. *Gardner,* 5 Ill. App. 3d 578, 283 N.E. 2d 693 (1972) the trial court entered an interlocutory order denying defendant's motion to dismiss the complaint based upon the unconstitutionality of the statute from which the defendant was allowed an immediate appeal. Likewise, in *King* v. *King,* 21 Ill. App. 3d 1062, 316 N.E. 2d 555 (1974) an interlocutory appeal was allowed where the trial court certified the question of whether the plaintiff, who filed as a poor person, was entitled to a waiver of the cost of service by publication in a divorce proceeding. In fact, a review of some of the Illinois cases in which interlocutory appeals have been allowed demonstrates that the majority of these cases present questions which could possibly obviate the need for further proceedings in the trial court.[1]

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1. Examples of such questions can be found in the following cases.

Sweeney v. *City of Chicago,* 131 Ill. App. 2d 537 (1971) (constitutionality of the Illinois Pension Code);

Wigginton v. *Reichold Chemicals, Inc.,* 133 Ill. App. 2d 776 (1971) (statute of limitations);

Stanfield v. *Medalist Industries, Inc.,* 17 Ill. App. 3d 996 (1974) (denial of motion to dismiss);

Scherer v. *Ravenswood Hosp. Medical Center,* 21 Ill. App. 3d 637 (1974) (denial of motion to dismiss);

Jamison v. *City of Chicago,* 25 Ill. App. 3d 326 (1974) (denial of motion to dismiss).

Other state appellate courts have already ruled on the constitutionality of summary state statutes under procedures which are similar to those which would be employed in this State. In *Hall* v. *Stone,* 229 Ga. 96, 189 S.E. 2d 403 (1972) the defendant filed a motion in the trial court to stay the marshall's seizure of her property based upon the unconstitutionality of the state statute. This motion was denied by the trial judge, who certified his Order for immediate review (189 S.E. 2d at 404). On appeal, the Court reversed the Order of the trial court, finding that the state statute violated "the due process guarantees of the United States Constitution." (*Id.*) Likewise, in *Hillhouse* v. *City of Kansas City, Mo.,* 559 P. 2d 1148 (Kan. 1977), the defendant filed a motion to quash an attachment, which was denied by the trial court. The Supreme Court of Kansas allowed an interlocutory appeal challenging the constitutionality of the Kansas statutory attachment procedures in which it reversed the Order of the trial court, finding that the challenged statute was unconstitutional (*Id.*). These cases amply demonstrate that an immediate appeal can be taken from an interlocutory order refusing to sustain a constitutional challenge to the validity of a summary prejudgment seizure remedy. Although it is true that the state procedures do not afford litigants an absolute right to take an interlocutory appeal, the intervention of the district court based upon the assumption that the state court would not allow an immediate appeal is a direct affront to the capabilities and good faith of the state courts. It should also be noted that any time a defendant raises a constitutional challenge to the validity of a state statute in a motion to dismiss, the order denying such a motion would be interlocutory. To allow federal intervention in all such cases would effectively abrogate the effect of this Court's decisions in *Younger* and *Huffman.*

In its opinion, the district court found that, prior to taking an appeal, plaintiffs must "file a bond guaranteeing the payment of the judgment, interest, damages and costs". However, this finding is manifestly erroneous. The Illinois Attachment Act contains no provision requiring the party taking an appeal from an order denying his motion to quash a writ of attachment to post such a bond. It is true that such a requirement could justify federal intervention where it resulted in an inability to perfect an appeal (*Caulder* v. *Durham Housing Authority*, 433 F. 2d 998 (4th Cir. 1970)), however, the Illinois courts have already demonstrated that they recognize that such a requirement would result in a deprivation of due process. In *Spring* v. *Little*, 50 Ill. 2d 351, 280 N.E. 2d 208 (1972) the Supreme Court of Illinois declared that the requirement that a bond be furnished as a prerequisite to taking an appeal in the Forcible Entry and Detainer Act was unconstitutional (280 N.E. 2d at 211). Even the requirement of a bond in order to obtain a stay of the effect of a money judgment (Ill. S.C.R. 305a) may be waived, since both the trial and appellate courts are authorized to grant such a stay "conditioned upon such terms as are just" (Ill. S.C.R. 305b). Therefore, there is no provision of state law which would require appellees to file a bond as a prerequisite to taking an appeal from an order denying their motion to quash an attachment because the Act does not afford them due process of law.

Thus, the Illinois court system did afford appellees a plain, speedy and efficient forum in which they could present their federal claim. The intervention of the district court in this case was plainly an unwarranted intrusion in a pending state court proceeding which failed to accord proper respect to the ability and integrity of the state court system and the vital state interests involved in this case.

II.

THE PROCEDURES PROVIDED FOR BY THE ILLINOIS ATTACHMENT ACT COMPORT WITH PRINCIPLES OF DUE PROCESS.

Assuming *arguendo*, that the principles of *Younger* and *Huffman* do not apply to this case, this Court should nevertheless take this case for plenary consideration so that the procedures of the Illinois Attachment Act can be tested against the due process requirements of the fourteenth amendment. The procedures in question here compare quite favorably with those which this court upheld in *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974). The district court's decision, however, effectively restricted the holding of *Mitchell* to the facts of that case rather than applying the traditional due process balancing of interests test to the facts of this case, as is mandated by the *Mitchell* decision.

In *Mitchell* this Court upheld a Louisiana statute which provides for sequestration of property where "one claims the ownership or right to possession of property . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." Under the statute a writ of sequestration issues "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts." The creditor is required to make this showing before a judge. He may do so, however, on ex parte application, without notice to the debtor or an opportunity to be heard. The debtor is entitled to seek immediate dissolution of the writ unless the creditor "proves the grounds upon which the writ was issued" (416 U.S. at 605-06, 40 L. Ed. 2d at 412-13).

In *Mitchell* the creditor filed suit alleging default in payment on an installment sales contract and requested that the property over which it had a vendor's lien be sequestered. The creditor also asserted that it had reason to believe that the debtor would "encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises." Based on the creditor's petition and affidavit, a Louisiana State court ordered, without prior notice or an opportunity for the debtor to be heard, that the property be sequestered. The property was seized on February 7, 1972, and on March 3rd, the debtor attacked the sequestration as violative of his due process rights. The court upheld the sequestration on March 16th, which decision was affirmed by the Supreme Court of Louisiana (416 U.S. at 601-03, 40 L. Ed 2d at 410-11).

In upholding the Louisiana provision, this Court weighed the competing interests involved, stating (416 U.S. at 610, 40 L. Ed. at 415):

> The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." Due process of law guarantees "no particular form of procedure; it protects substantial rights." "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller. [citations omitted]

The Court found the possible deterioration and destruction of the property over which the creditor had a lien to be a significant interest which outweighed the impact on the debtor of the deprivation of the property in question,

in view of the low risk of a wrongful sequestration under the procedures of the Louisiana statute (416 U.S. at 610, 40 L. Ed. 2d at 415).

The Court also stated (416 U.S. at 609, 40 L. Ed. 2d at 414):

> [T]here is scant support in our cases for the proposition that there must be final judicial determination of the seller's entitlement before the buyer may be even temporarily deprived of possession of the purchased goods. On the contrary, it seems apparent that the seller with his own interest in the disputed merchandise would need to establish in any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit. The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn ex parte documents, followed by the early opportunity to put the creditor to his proof. [citations omitted]

In balancing the interests, risks, and statutory safeguards under the Illinois Attachment Act, it seems clear that the scales tip toward the validity of the Act, at least as applied here. The creditor is required to file an affidavit setting forth the nature and amount of his claim, as well as one of the nine narrow circumstances in which attachment may issue (§§ 1, 2). The affidavit must allege facts unequivocally, and not merely on information and belief (*e.g. Rabbitt* v. *Weber & Co.*, 297 Ill. 491, 130 N.E. 787 (1921); *Brandenburg* v. *Malcolm*, 102 Ill. App. 303 (1902)). And while such averments might be characterized as somewhat conclusory they are no more so than the creditor's in *Mitchell*. Furthermore, in this case, a sworn

complaint was filed in the State court contemporaneously with the filing of the affidavit, which specifically set forth the basis of the State's claim.

While a creditor's lien is not involved in this case, as was in *Mitchell*, the Illinois Act is narrowly drawn to extend only to cases of fraud or the debtor's absence from the State. These circumstances present a very real and definite threat to the creditor—far more so than was involved in *Mitchell*.

In actions sounding in tort, the creditor must be examined by a judge concerning his cause of action before a writ of attachment may issue (§ 2).[2] In contract actions, the matters involved are ordinarily substantiated by documentary proof (416 U.S. at 609, 40 L. Ed. 2d at 415), which in practical effect means that an ex parte appearance before a judge would be a mere formality. The debtor is also protected by the creditor's bond, except where a State agency is the creditor as here (§§ 4a, 4b), and may recover damages for wrongful attachment in all cases (§ 4a, 27). The debtor may also recover possession of the property by filing a bond (§§ 14, 15). Destruction of the attached property is precluded because the Sheriff retains custody of it (§ 14).

The debtor is also given an early, though admittedly not immediate, hearing within sixty days of the attachment (§§ 6, 25), and he may well be able to advance the date of

2. The complaint filed in the State court in this case proceeded upon a contract theory. Since the underlying claim is fraud, however, it seems apparent that plaintiffs could have attempted an attack on the writ of attachment as being illegally issued, in that fraud sounds in tort, and thus, it was necessary for the State to apply to a judge for the writ. Whether the State should have so proceeded in this case is a question peculiarly for the State courts.

the hearing by filing a motion to dismiss. At the hearing he may either attack the attachment itself or defend on the underlying claim (§ 26). The burden of proof is on the creditor.

Furthermore, an immediate hearing can be sought under § 70 of the Civil Practice Act (Ill. Rev. Stat., 1977, ch. 110, § 70). This section allows a party to move to set aside or quash an execution, bond, "or other proceeding" by applying to the trial court or judge for a certificate "that there is probable cause for staying further proceedings until the order of the court on the motion." The applicant must give notice of such a motion "to the opposite party, or his attorney of record." This section would allow an individual an immediate post-seizure hearing to determine the validity of the underlying claim and thus would minimize the effect of a lack of a preseizure hearing.

In sum, the impact of the attachment on the debtor under the Illinois Act is outweighed by the immediate and serious threats to creditors as narrowly defined by the Illinois Act (§ 1), the provisions safeguarding against wrongful attachments (§§ 2, 4a, 4b, 14, 26, 27), and the debtor's early opportunity for a hearing (§§ 6, 25).

The validity of the *Mitchell* approach to the due process requirements of seizure of a debtor's property was in no sense impaired by this Court's holding in *North Georgia Finishing, Inc.* v *Di-Chem, Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975). The statute in *North Georgia Finishing* had "none of the saving characteristics of the Louisiana statute" (419 U.S. at 607, 42 L. Ed. 2d at 757), while the statute involved in this case closely parallels the Louisiana provision.

Moreover, the Illinois Act, as applied in this case, passes constitutional muster even under the broad sweep of

Fuentes v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). While striking down two pre-judgment replevin statutes in that case, this Court recognized that certain governmental interests may serve as a basis for immediate pre-trial action (407 U.S. at 90-91, 32 L. Ed. 2d at 575-76);

> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. [Citations and footnotes omitted].

The attachment of funds in plaintiffs' credit union account is "directly necessary to secure an important governmental interest." The Illinois Department of Public Aid attached the amount as part of its general effort to eliminate various forms of welfare fraud (Ill. Rev. Stat. 1973, ch. 23, § 11-21). There is a "special need for very prompt action," because in dealing with the type of welfare case at issue, there is a real danger that the recipient under investigation will take steps to hinder the inquiry by either removing the funds from their present location or leaving the jurisdiction. The State has a significant interest in the subject property that has been attached, which cannot be sufficiently protected if a lapse of time were to ensue before seizure of the property. The State has exercised its statutory authority to investigate and correct fraudulent acts only after careful investigation, and is able to exercise this authority to attach property only where there is a very real danger of inability to collect the money to which it is entitled, absent attachment.

In light of the vital state interests involved in this case and the fact that this Court has not spoken to the validity of procedures like those provided for by the Illinois Act, it is respectfully submitted that this Court give this case plenary consideration. The following cases are inconsistent with the district court's decision in this case: *Hutchison* v. *Bank of North Carolina*, 392 F. Supp. 888 (M.D. N.C. 1975); *Harrison* v. *Morris*, 370 F. Supp. 142 (D. S.C. 1974).

CONCLUSION

For the foregoing reasons, appellants believe that the questions presented by this appeal are substantial and of broad importance and application. Appellants, therefore, respectfully urge this Honorable Court to give this case its full consideration and reverse the district court's judgment.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago Illinois 60601 (793-3500),
Attorney for Appellants,
Quern and O'Malley.

PAUL J. BARGIEL,
PATRICIA ROSEN,
Assistant Attorneys General,
160 North LaSalle Street, Suite 800
Chicago, Illinois 60601 (793-5635)
Of Counsel.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated, Plaintiffs,

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid, Defendants.

No. 74 C 3473

ORDER

In accordance with this Court's memorandum opinion, the Court enters judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure as follows:

1. Illinois Revised Statutes, Chapter 11, Sections 1, 2, 2a, 6, 8, 10 and 14 are on their face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Defendants Finley and Elrod are ordered to cause release of all property of plaintiffs Juan and Maria Hernandez attached pursuant to writ of attachment.

3. Defendant Finley and all other clerks for the judicial circuits of Illinois, their successors, agents and employees are hereby enjoined from issuing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 § 1, subsections sixth through ninth.

4. Defendant Elrod and all other county sheriffs of the State of Illinois, their successors, agents and employees are hereby enjoined from executing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 § 1, subsections sixth through ninth.

5. Defendants Trainor and O'Malley are hereby enjoined from authorizing and processing applications for writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, § 1, subsections sixth through ninth.

6. Defendants Finley and Elrod, all other clerks of the judicial circuits of Illinois, and all other county sheriffs of Illinois, are ordered to cause release of any property currently attached pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, § 1, subsections sixth

through ninth, and give notice of such release to all persons whose property is the object of such attachments.

7. The question of plaintiff's entitlement to money damages is remanded for determination to Judge Kirkland, the Judge to whom this case was originally assigned.

ENTER:

WILBUR F. PELL, JR.,
U.S. Circuit Court Judge,

JOEL M. FLAUM,
U.S. District Court Judge,

ALFRED Y. KIRKLAND,
U.S. District Court Judge.

Dated: December 15, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ, et al.,
Plaintiffs,
v.
MORGAN M. FINLEY, et al.,
Defendants.

No. 74 C 3473

ORDER

This Court pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure has fully considered the plaintiffs' motion to certify this suit as a plaintiff and defendant class action, the memoranda in support thereof, defendants' response thereto, and the other documents filed in this matter, and finds as follows:

1. Plaintiffs are persons whose property was attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, § 1, parts sixth through ninth.

2. Plaintiffs represent the class of all persons who now have or may have their property attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, § 1, parts sixth through ninth.

3. The plaintiff class meets all the requirements of Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

4. Defendant Morgan M. Finley is the Clerk of the Circuit Court of Cook County.

5. Defendant Finley represents the class of all persons who are clerks of the circuit courts for the judicial circuits of Illinois.

6. Defendant Richard J. Elrod is the elected sheriff of Cook County.

7. Defendant Elrod represents the class of all persons who are county sheriffs of Illinois.

8. The defendant classes meet all the requirements of Rules 23(a) and 23(b)(1)(A) of the Federal Rules of Civil Procedure.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this suit may be maintained as a plaintiff and defendant class action.

The plaintiff class is defined as all persons who now have or may have their property attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, § 1 parts sixth through ninth.

The defendant classes are defined as follows: all clerks of the circuit courts for the judicial circuits of Illinois; all county sheriffs of Illinois.

Enter:

ALFRED Y. KIRKLAND,
Judge,
United States District Court.

Date: October 31, 1975

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated, Plaintiffs,

v.

MORGAN FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, ARTHUR QUERN, Director of the Illinois Department of Public Aid, individually, and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid, Defendants.

No. 74 C 3473

MEMORANDUM OPINION AND ORDER

This case is before the Court on remand from the Supreme Court, *Trainor* v. *Hernandez,* 431 U.S. 434 (1977),

for further proceedings consistent with its opinion. The Supreme Court found that this Court wrongly refused to apply the principles of abstention enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) and remanded the case. The Court did not reach the issue of "whether appellees [plaintiffs herein] could have presented their federal due process challenge to the attachment statute in the pending state proceeding." 431 U.S. at 447.

The facts of this case are detailed in this Court's earlier opinion reported at 405 F. Supp. 757 and in the Supreme Court's opinion.

I. ADEQUACY OF STATE PROCEEDINGS TO LITIGATE PLAINTIFFS' FEDERAL DUE PROCESS CLAIM

The principles established in *Younger* v. *Harris, supra*, and *Huffman* v. *Pursue, Ltd., supra*, require federal courts to abstain from exercising jurisdiction and to dismiss a case seeking to enjoin the operation of a state statute when a previously instituted state court action involving the challenged statute is pending and certain other conditions exist. *See also Trainor* v. *Hernandez, supra*, and *Juidice* v. *Vail*, 430 U.S. 327 (1977). These conditions are that: (1) the pending state suit involves enforcement of important state policies or interests; (2) the federal plaintiff (the defendant in the state suit) has an adequate remedy at law; and (3) the plaintiff will not suffer irreparable harm if denied equitable relief by the federal court.

The reasons for *Younger* abstention are two-fold. First, the "basic doctrine of equity jurisprudence" mandates that courts of equity should not act "when the moving party has an adequate remedy at law and will not suffer irreparable

injury if denied equitable relief." *Younger, supra*, at 43-44. Second, considerations of equity, comity and federalism inherent in the overlapping jurisdiction of our legal system dictate that the federal court should not intervene in an already pending state proceeding. *Huffman* v. *Pursue, Ltd., supra.*

At this stage, it is law of the case that none of the exceptions and all the necessary conditions for *Younger* abstention exist, with the possible exception of the prerequisite of an "adequate remedy at law." It is solely this issue that remains after the remand of this suit by the Supreme Court. Thus, if the Illinois attachment procedures are found to provide plaintiffs with an "adequate" forum in which to challenge the constitutionality of the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, § 1 et seq. (the "Act"), this case must be dismissed.

Plaintiffs contend that the state attachment proceeding does not afford them an adequate forum in which to present their federal due process claims. Plaintiffs claim that because of this inadequacy they are entitled to declaratory and injunctive relief against the enforcement procedures of the Act. Plaintiffs therefore seek reinstatement of this Court's Order and declaratory judgment of December 15, 1975, 405 F. Supp. 757. That Order declared that the Act violated the due process clause of the Fourteenth Amendment and enjoined state officials from using or enforcing its provisions.

Defendants argue that state courts may be presumed capable of adjudicating federal constitutional issues. Defendants contend that pursuant to Illinois Supreme Court Rule 184, plaintiffs could have filed a motion to quash the attachment on constitutional grounds and that any adverse ruling on plaintiffs' claim could be appealed pursuant to

Illinois Supreme Court Rules 304 and 308. Further, defendants assert that plaintiffs could obtain a stay of enforcement of judgment under Illinois Supreme Court Rule 305 to prevent their claim from being mooted by an adjudication of the underlying cause of action. In short, while defendants acknowledge that, "[i]t is impossible to accurately determine what would happen if plaintiffs had presented their constitutional claims in state court," defendants contend that the Illinois courts provide plaintiffs with an adequate opportunity to litigate their constitutional claims.

The Supreme Court has never fully defined an "adequate" remedy for the presentation of a federal constitutional claim in a pending state court proceeding. Minimally, there must exist "a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman, supra,* at 592. In *Kugler* v. *Helfant,* 421 U.S. 117 (1975), the Supreme Court held:

> The policy of equitable restraint expressed in *Younger* v. *Harris,* in short, is founded on the premise that ordinarily a pending state prosecution provides the accused *a fair and sufficient opportunity* for vindication of federal constitutional rights. (citation omitted) 421 U.S. at 124-125. (emphasis added)

Since *Younger* abstention results in dismissal of the federal suit, there must be an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill,* 411 U.S. 564, 577 (1973). A meaningful opportunity to appeal any adverse ruling through the state appellate system must also be available. *Huffman, supra* at 609. Moreover, when a state remedy is uncertain, the federal court must provide relief. *Tully* v. *Griffin, Inc.,* 429 U.S. 68, 76 (1976); *Spector Motor Service* v. *O'Connor,* 340 U.S. 602, 605 (1951).

Thus, federal courts have found state remedies less than adequate for litigation of constitutional claims where state law appeared to preclude a constitutional challenge in the currently pending state proceedings. *See, e.g., Grandco Corp.* v. *Rochford,* 536 F. 2d 197, 206 (7th Cir. 1976); *Doe* v. *Maher,* 414 F. Supp. 1368, 1375-77 (D. Conn. 1976) (three judge court) *on remand from Roe* v. *Norton,* 422 U.S. 391 (1975). The Court in *Lessard* v. *Smith,* 413 F. Supp. 1318, 1320 (E.D. Wis. 1976) (three judge court) *on remand from* 421 U.S. 957 (1975) found that an "appearance of preclusion" existed when plaintiffs had but a "questionable right of appeal" concerning any constitutional challenge they might raise in the state forum. In *Owens* v. *Housing Authority of City of Stanford,* 394 F. Supp. 1267, 1271 (D. Conn. 1975), the requirement of an appeal bond in an eviction case, among other factors, led the Court to conclude that the ability to litigate the constitutional claim in state court was "more theoretical than real." *See Caulder* v. *Durham Housing Authority,* 433 F. 2d 998, 1002 (4th Cir. 1970).

Plaintiffs argue that, *at best,* their ability to raise a constitutional challenge to the Act at the hearing on the propriety of the attachment is uncertain or "more theoretical than real." Plaintiffs contend that the only section of the Act that provides for a hearing on the propriety of the attachment is Section 27 and that Section does not give defendant an absolute right to a hearing immediately after the seizure.

Section 27 provides that:

> The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found

> for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons.

Plaintiffs assert that although Section 27 allows the defendant in the state proceeding to file a motion to quash the attachment, the sole purpose of such a motion is to test the sufficiency and truth of the facts alleged in the affidavit supporting the attachment bond. Plaintiffs claim that Section 28 of the Act restricts challenges to the attachment exclusively to the issues of whether prescribed procedures have been followed and whether the allegations of the affidavit are true. *Schwabacker* v. *Rush*, 81 Ill. 310 (1897); *Ridgeway* v. *Smith*, 17 Ill. 33 (1855).

Section 28 provides that:

> No writ of attachment shall be quashed, nor the property taken hereon restored, nor any garnishee discharged, nor any bond by him given canceled, nor any rule entered against the sheriff discharged, on account of any insufficiency of the original affidavit, writ of attachment or attachment bond, if the plaintiff, or some credible person for him, shall cause a legal and sufficient affidavit or attachment bond to be filed or the writ to be amended, in such time and manner as the court shall direct; and in that event the cause shall proceed as if such proceedings had originally been sufficient.

Plaintiffs argue that even if a constitutional challenge to the Act's procedures could be considered on a motion to quash the attachment, there is no immediate right to appeal a rejection of such a challenge. An order denying a motion to quash is interlocutory and not appealable. *Smith* v. *Hodge*, 13 Ill. 2d 197 (1958); *Brignall* v. *Merkle*, 296 Ill. App. 250 (1933); *American Mortgage Corp.* v. *First National Mortgage Corp.*, 345 F. 2d 527, 528 (7th Cir. 1965). Thus, the ruling on the validity of an attachment does not become final until the underlying claim is resolved. *Smith* v. *Hodge, supra.* Plaintiffs claim that at that time the constitutional issue concerning the attachment procedure will be moot because the prevailing party will then be entitled to the property regardless of the validity of the attachment.

In sum, plaintiffs contend that the Illinois attachment procedure does not provide an adequate forum in which to raise their constitutional claim since the Act does not afford a plain, speedy, efficient and certain remedy for review of their federal claim. Thus, plaintiffs assert that the principles of *Younger* and *Huffman* are inapplicable. This Court agrees.

Defendant's contentions to the contrary are inapposite. Illinois Supreme Court Rule 184 provides that *a party may* call up a motion for disposition before or after the expiration of any filing period prescribed by statute or rule. Rule 184 in no way expands or contradicts the limited challenges authorized by Section 28 nor does it provide assurance of a prompt hearing. Since certification of an interlocutory appeal is discretionary and denial thereof is not appealable, *E.M.S. Co.* v. *Brandt*, 103 Ill. App. 2d 445 (1968), Illinois Supreme Court Rules 304 and 308 also do not provide plaintiffs with a meaningful opportunity to appeal any adverse ruling. Likewise, the possibility of a stay pending appeal pursuant to Illinois Supreme Court Rule 305 does not afford plaintiffs an adequate remedy for their constitutional claim. Not only must plaintiffs file a bond guaranteeing the payment of the judgment, interest, damages and costs, but the *possibility* of *eventual* appeal is no substitute for the right to an immediate appeal challenging plaintiffs' *current deprivation* of property. See *United States General, Inc.* v. *Arndt*, 417 F. Supp. 1300, 1310 (E.D. Wis. 1976).

The language of the Act and its construction make it unlikely that Illinois courts would ever address plaintiffs' constitutional claim. Thus, plaintiffs lack an "adequate" state forum in which to challenge the constitutionality of the Act.

This case therefore lacks a fundamental requirement for *Younger* abstention.

II. DEFENDANTS' MOTION TO DISMISS

In addition to seeking dismissal of plaintiffs' case, defendants' Motion requests that this Court vacate its Orders of October 31, 1975 (certifying this action as a class action) and December 15, 1975 (granting summary judgment and enjoining operation of the Act). By Order of September 27, 1977 this Court vacated the declaratory judgment and injunction entered on December 15, 1975.

Defendants argue that plaintiffs' case is moot because the attachment action against named plaintiffs was dismissed on March 10, 1976. This Court finds defendants' contention unpersuasive.

A crucial element of defendants' argument that this case is now moot is their claim that this case was improperly certified as a class action. Defendants cite footnote 11 of the Supreme Court's decision as support for this contention. 431 U.S. at 447, n. 11. However, that note does not state that certification of a class in this case is itself error.

The Supreme Court's footnote in no way addressed the merits of class certification. Rather, the conclusion contained in the note is premised on the Court's finding that the grounds on which this Court relied in refusing to abstain were infirm.

The Court's view contained in the note is merely the logical conclusion of the process the Court would have district

courts employ when faced with claims for dismissal based upon *Younger* abstention. Under the Court's analysis, district courts are to reach the abstention issue first and only determine class certification if dismissal based on abstention is not proper. Since the Supreme Court's opinion found the grounds relied upon by this Court in not abstaining were infirm, it found this Court's *consideration* of the class certification issue inappropriate. Thus, this Court must first determine whether *Younger* abstention is appropriate before considering class certification.

Since this Court has now determined that plaintiffs are without an adequate state forum to vindicate their constitutional claims, *Younger* abstention is not required. This Court again considers class certification and finds plaintiff class remains properly certified. Defendants' request to vacate the Order of October 31, 1975 is denied. Consequently, any claim of mootness for the named plaintiffs must be considered under standards appropriate for determination of mootness in class actions.

The state court record of proceedings reveals that defendants' attachment action against plaintiffs was stricken with leave to refile. As the Seventh Circuit stated in *Rabinowitz* v. *Board of College Dist. No. 508,* 507 F. 2d 1255 (7th Cir. 1974):

> It is established doctrine that the voluntary cessation of the complained action is not sufficient to moot litigation. It must appear with assurance "that 'there is no reasonable expectation that the wrong will be repeated,' " (citation omitted). The defendants have the "heavy burden of persuasion." (citation omitted). 507 F. 2d at 1256.

See also, Super Tire Engineering Company v. *McCorkle,* 416 U.S. 115 (1974).

Defendants have failed to meet their heavy burden. Not only could the action against plaintiffs be refiled, but plaintiffs also remain subject to prejudgment seizure of their property by defendants' sheriffs and clerks under the Act. The challenged governmental action has not evaporated or disappeared and "its continuing and brooding presence, casts . . . [an] adverse effect on the interests of the . . . parties." *Super Tire Engineering Company* v. *McCorkle, supra; United States* v. *W. T. Grant,* 345 U.S. 629, 632 (1953).

Named plaintiffs are seeking damages as well as declaratory relief. Thus, even if their claim for declaratory relief were dormant, their request for monetary relief remains viable. *See, e. g., Brown* v. *Liberty Loan Corp. of Duval,* 392 F. Supp. 1023, 1028-30 (M.D. Fla. 1974), *rev'd on other grounds,* 539 F. 2d 1355 (5th Cir. 1976). Even assuming, *arguendo,* that all of named plaintiffs' claim is moot, there is still a live controversy between defendants and the members of plaintiff class. *See Franks* v. *Bowman,* 424 U.S. 747 (1976).

Finally, the most compelling indication that this case is not moot is that there has been no change in the status of the parties since the Supreme Court remanded this case for further proceedings consistent with its opinion. Indeed, plaintiffs state that the Court was aware that defendants' case in state court had been stricken with leave to reinstate prior to the Court's decision since counsel for plaintiffs argued these facts in court and in their briefs. In light of the normal practice of the Court to consider the issue of mootness as a preliminary matter, its consideration of substantive issues and subsequent remand demonstrates that the Court had before it a "live" case or controversy. *Sosna* v. *Iowa,* 419 U.S. 393, 398 (1975).

Accordingly, defendants' Motion to Dismiss is denied.

III. PLAINTIFFS' MOTION TO REINSTATE JUDGMENT

Plaintiffs seek to have this Court reinstate the Order entered December 15, 1975. That Order enjoined state officials from using or enforcing the Act's provisions.

After careful consideration of the parties' arguments, this Court finds that the Act and the procedures contained therein do not afford plaintiffs an adequate forum for vindication of federal constitutional rights. Therefore, *Younger* abstention is not applicable to this case. *See* Part I of this Court's Opinion.

Accordingly, plaintiffs' Motion to Reinstate Judgment is granted. The Court hereby reinstates its Order of December 15, 1975 and incorporates it here by reference.

IV. CONCLUSION

Defendants' Motion to Dismiss is denied.

Plaintiffs' Motion to Reinstate Judgment is granted.

The Court hereby reinstates its Order of December 15, 1975, and incorporates it herein by reference.

ENTER:

WILBUR F. PELL, JR.,
CIRCUIT JUDGE

ENTER:

JOEL M. FLAUM,
DISTRICT JUDGE

ENTER:

ALFRED Y. KIRKLAND,
DISTRICT JUDGE

DATED: Aug. 1, 1978

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ, et al.,
Plaintiff,
vs.
MORGAN M. FINLEY, et al.,
Defendants.
No. 74 C 3473

NOTICE OF FILING

TO: Northwest Neighborhood Legal Service
1212 North Ashland Avenue
Chicago, Illinois 60622

John A. Dienner, III
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602

PLEASE TAKE NOTICE that on the 18th day of September, 1978, I filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, the attached Notice of Appeal.

WILLIAM J. SCOTT,
Attorney General,
State of Illinois.

BY _____

PATRICIA ROSEN,
Assistant Attorney General,
160 N. LaSalle Street, Room 800,
Chicago, Illinois 60601 (793-5635).

CERTIFICATE OF SERVICE

I hereby certify that I mailed copies of the aforementioned to the persons hereinabove specified by placing them in the mail chute at 160 N. LaSalle Street, Chicago, Illinois 60601, postage prepaid, on the 18th day of September, 1978.

BY _____

PATRICIA ROSEN,
Assistant Attorney General.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ, et al.,
Plaintiff,
vs.
MORGAN M. FINLEY, et al.,
Defendants.
No. 74 C 3473

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Defendants, ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, and VIVIAN O'MALLEY, by and through their attorney, WILLIAM J. SCOTT, Attorney General, State of Illinois, hereby appeal to the United States Supreme Court from the Memorandum Opinion and Order of August 1, 1978, pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois.

BY _____

PATRICIA ROSEN,
Assistant Attorney General,
160 N. LaSalle Street, Room 800,
Chicago, Illinois 60601 (793-5635).

APPENDIX D

THE ILLINOIS ATTACHMENT ACT, ILLINOIS REVISED STATUTES 1973, CHAPTER 11.

1. Causes.] § 1. In any court having competent jurisdiction, a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting suit or thereafter, when the claim exceeds $20, in any one of the following cases:

First: Where the debtor is not a resident of this State.

Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

Sixth: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

Seventh: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

Ninth: Where the debt sued for was fraudulently contracted on the part of the debtor: Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney.

1a. Venue.] § 1a. The venue provisions applicable to other civil cases shall apply to attachment proceedings; and in addition thereto, attachment proceedings may be brought in the County where property or credits of the debtor are found.

2. Affidavit — Statement — Examination under oath.] § 2. To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of the circuit cou', an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in section 1, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same together with a written statement, either embodied in such affidavit or separately in writing, executed by the attorney or attorneys representing the creditor, to the effect that the attachment action invoked by such affidavit does or does not sound in tort, also a designation of the return day for the summons to be issued in said action. In all actions sounding in tort, before the writ of attachment shall be issued, the plaintiff, his agent or attorney, shall apply to a judge of the circuit court of the county in which the suit is to be brought or is pending and be examined,

under oath, by such judge concerning the cause of action; and, thereupon, such judge shall indorse upon the affidavit the amount of damages for which the writ shall issue, and no greater amount shall be claimed.

2a. Form of affidavit.] § 2a. Affidavits for attachment before courts may be substantially in the following form:

STATE OF ILLINOIS,)
) ss.
..... County)

A B, being duly sworn, says: That (here state if affiant is agent or attorney of the creditor; if suit is by an individual or corporation, the name of such individual or corporation, and if the suit is by a firm, the name of the partners) has a just demand against (name of debtor), on account of (here make short statement of the nature and amount of the claim), and the affiant believes (the name of the creditor) is entitled to recover of said (name of debtor), after allowing all just credits and set-offs ..... dollars and ..... cents, which is now due, and that he has good reason to believe and does believe that (name of debtor) (here state the residence of the debtor if known, or if not, that the affiant has made diligent inquiry and cannot ascertain his place of residence.)

.....

Subscribed and sworn to before me on this.....
day of....., ..., A.D.

.....

My commission expires....., ..., A.D.

(If action sounds in tort here include the endorsement of judge as to amount of damages for which writ shall issue.)

3. Names, etc., heirs, etc.] § 3. [Omitted]

4. § 4. Repealed]

4a. Bond — State and its departments and officers exempt.] § 4a. Before granting an attachment, as aforesaid, the clerk shall take bond and sufficient security, payable to the People of the State of Illinois, for the use of the person or persons interested in the property attached, in double the sum sworn to be due, conditioned for satisfying all costs which may be awarded to such defendant, or to any others interested in said proceedings, and all damages and costs which shall be recovered against the plaintiff, for wrongfully suing out such attachment — which bond, with affidavit of the party complaining, or his agent or attorney, shall be filed in the office of the clerk granting the attachment. Every attachment issued without a bond and affidavit taken, is hereby declared illegal and void, and shall be dismissed: Provided, however, that nothing herein contained shall be construed to require the State of Illinois, or any Department of Government thereof, or any State officer, to file a bond as plaintiff in any proceeding instituted under this Act.[1]

4b. Court may fix bond in double value of property to be attached.] § 4b. The court, or a judge thereof, upon ex parte motion, without notice, supported by affidavit of the plaintiff, his agent or attorney, substantially describing the property to be attached, and the value thereof, may, if satisfied of the bona fides of the application and sufficiency of the bond under the circumstances of the case, including proposed garnishments, fix the amount of the bond in double the value of the property to be attached, instead of double the sum sworn to be due, and in such event the writ shall direct the officer to attach said specifically described property, but the value of said property to be attached shall not be in excess of an amount sufficient to satisfy the debt claimed and costs. The court may require that said affidavit be supplemented by additional showing, by appraisal or otherwise, as to the value of said property, and may, upon motion of any party to the action claiming an interest in said property, either before or after actual attachment, require additional security, or order release of the attachment to the extent not covered by adequate double security.

1. Section 1 et seq. of this chapter.

5. Condition of bond.] § 5. The condition of the bond required in the preceding section[1] shall be applicable to alias and pluries writs as well as original writs and shall be substantially in the following form:

The condition of this obligation is such, that whereas the above bounden ..... hath, on the day of the date hereof, prayed an attachment out of the..... Court of said County, at the suit of..... against the estate of the above named..... Now, if the said ..... shall prosecute his suit with effect, or in the case of failure therein shall well and truly satisfy all costs which may be awarded to said ..... or to any person or persons interested in the property attached, and all damages and costs which shall be recovered against the plaintiff for wrongfully suing out the said writ of attachment, or alias or pluries writ or writs of attachment, then the above obligation to be void; otherwise to remain in full force and effect.

Additional bonds shall not be required for the issuance of alias and pluries writs, except as provided in Section 10a[2] of this Act.

1. " Preceding section" now repealed. But see section 4a, ante.

2. Section 10a of this chapter.

6. Writ—Form.] § 6. The writ of attachment required in the preceding section shall be directed to the sheriff (and, for purpose only of service of summons, to any person authorized to serve writs of summons), or in case the sheriff is interested, or otherwise disqualified or prevented from acting, to the coroner of the county in which the suit is commenced, and shall be made returnable on a return day designated by the plaintiff, which day shall not be less than ten days or more than sixty days after its date. Such writ shall be substantially in the following form: The People of the State of Illinois to the Sheriff of ..... County: or for the purpose only of service as summons; to any person authorized to serve writs of summons:—Greeting:

Whereas A B (or agent or attorney of A B, as the case may be), hath complained that C D is justly indebted to the said A B to the amount of ..... and that (here state the cause set out in the affidavit) and the said ..... having given bond and security, according to law: We therefore command you that you attach so much of the estate, real or personal, of the said C D, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the affidavit, but in case any specific property of the said C D, found in your county shall be described in this writ, then you shall attach said described property only, and no other property, the said specified property to be so attached, being described as follows:

.....

.....

and such estate so attached in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law; and that you summon C D to appear and answer the complaint of said A B,

before the ..... Court of ..... at ..... in the county of ..... on the ..... day of ..... next; and that you also summon ..... and such other persons as you shall be required by the said A B, as garnishees, to be and appear before the said court on the said ..... day of ..... next, then and there to answer to what may be objected against them. When and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness ..... clerk of the said court, this ..... day of ..... in the year of our Lord, etc.

Which writ of attachment shall be signed by the clerk, and the seal of the court shall be affixed thereto.

7. Attachment against a joint debtor.] § 7. In all cases where two or more persons are jointly indebted, either as partners or otherwise, and an affidavit shall be filed as provided in the first section of this act, so as to bring one or more of such joint debtors within its provisions, and amendable to the process of attachment, then the writ of attachment shall issue against the property and the effects of such as are so brought within the provisions of this act; and the officer shall be also directed in said writ to summon, all defendants to the action, whether the attachment is against them or not, to answer to the said action, as in other cases of joint defendants.

8. Execution of writ.] § 8. Such officer shall without delay execute such writ of attachment upon the property described in the writ, or in the absence of such description, upon the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any lands and tenements in and to which such debtor has or may claim any equitable interest or title, of sufficient value

to satify the claim sworn to, with costs of suit as commanded in such writ.

Except as providesd in Section 11[1] of this act, the writ of attachment may be levied only in the county to which the writ is issued, and by a proper officer of said county.

9. Certificate of levy—Effect.] § 9. [Omitted]

10. Serving defendant—Return.] § 10. The officer shall also serve said writ upon the defendant therein, if he can be found, in like manner as provided for service of summons in other civil cases. The return of such writ shall state the particular manner in which the same was served. If the writ is served upon the defendant less than ten days before the return day thereof, he shall not be compelled to appear or plead until fifteen days after the return day designated in the writ. The writ of attachment may be served as a summons upon defendants wherever they may be found in the State, by any person authorized to serve writs in like manner as summons in other civil cases.

10a. Alias and pluries writs.] § 10a. [Omitted]

11. Pursuit of property.] § 11. [Omitted]

12. Writ issued and served on Sunday.] § 12. [Omitted]

13. Writs to other counties.] § 13. [Omitted]

14. Possession—Forthcoming bond.] § 14. The officer serving the writ shall take and retain the custody and possession of the property attached, to answer and abide by the judgment of the court, unless the person in whose possession the same is found shall enter into bond and security to the officer, to be approved by him, in double the value of the property so attached with condition that the said estate and property shall be forthcoming to answer the judgment of the court in said suit. The sheriff,

1. Section 11 of this chapter.

or other officer shall return such bond to the court in which the suit is brought, on the day to which such attachment is returnable.

15. Bond or recognizance to pay judgment.] § 15. Any defendant in attachment, desiring the return of property attached, may, at his option, instead of or in substitution for the bond required in the preceding section, give like bond and security, in a sum sufficient to cover the debt and damages sworn to in behalf of the plaintiff, with all interest, damages and costs of suit, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be rendered against him in that suit, on a final trial, within ninety days after such judgment shall be rendered or a recognizance, in substance as aforesaid, may be taken in open court, and entered of record, in which case the court shall approve of the security and the recognizance made to the plaintiff, and upon a forfeiture of such recognizance judgment may be rendered and execution issued as in other cases of recognizance. In either case, the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons.

16. Neglect of officer to take bond — Proceedings.] § 16. [Omitted]

17. Neglect to return sufficient bond — Proceedings.] [Omitted]

18. Suit on bond.] § 18. [Omitted]

19. Sustenance of live stock — Compensation.] § 19. When any sheriff or other officer shall serve an attachment on horses, cattle or live stock, and the same shall not be immediately replevied or restored to the debtor,

such officer shall provide sufficient sustenance for the support of such live stock until the same shall be sold or discharged from such attachment. He shall receive therefor a reasonable compensation, to be ascertained and determined by the court out of which the attachment issued, and charged in the fee bill of such officer, and shall be collectible as part of the costs.

20. Perishable property.] § 20. When any goods and chattels are levied on by virtue of any attachment, and the sheriff or other officer having custody of such goods and chattels is of the opinion that they are of a perishable nature and in danger of immediate waste or decay, such sheriff or other officer shall demand that the plaintiff in such attachment obtain from the court out of which the attachment issued an order permitting such property to be sold not later than 24 hours after the levy has been made, upon due notice of sale to the defendant and to the public as the court in its order shall require. The money arising from such sale shall be liable to the judgment obtained upon such attachment, and deposited in the hands of the clerk of the court to which the process is returnable.

If the plaintiff in the attachment fails or refuses to obtain such an order for sale of perishable property, the sheriff or other officer making the levy shall be absolved of all responsibility to any person for loss occasioned by the failure to sell or care for such perishable property. The demand of the sheriff or other officer shall be written and shall be delivered to the plaintiff or his attorney or agent, and to the defendant if found. If defendant is not found, a copy of the demand shall be posted on the premises where the perishable items are located. Plaintiff's motion for an order of sale of perishable property shall be treated as an emergency motion.

21. Garnishment.] § 21. The sheriff or any other person authorized to serve writs of summons shall, in like manner as writs of summons are served in ordinary civil cases, summon, wherever they may be found in the State, the persons mentioned in such attachment writ as garnishees and all other persons whom the creditor shall designate as having any property, effects, choses in action or credits in their possession or power, belonging to the defendant, or who are in anywise indebted to such defendant, the same as if their names had been inserted in such writ. The persons so summoned shall be considered as garnishees. The return shall state the names of all persons so summoned, and the date of such services on each.

Persons summoned as garnishees shall thereafter hold any property, effects, choses in action or credits in their possession or power belonging to the defendant which are not exempt, subject to the court's order in such proceeding, and shall not pay to the defendant any indebtedness owed to him subject to such order, and such property, effects, choses in action, credits and debts shall be considered to have been attached and the plaintiff's claim to have become a lien thereon pending such suit. A security which is transferable as provided in Section 8-320 of the Uniform Commercial Code[1] is, for purposes of this Act, only in the possession or power of the person which carries on its books an account in the name of the defendant in which is reflected an interest in such security, or, if such security has been pledged by the defendant, the pledgee of the defendant.

22. Notice by publication and mail.] § 22. When it shall appear by the affidavit filed or by the return of the officer, that a defendant in any attachment suit is not a

1. Chapter 26, § 8-320

resident of this State, or the defendant has departed from this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and that property of the defendant has been attached, or that persons having such property or effects, choses in action or credits belonging to defendant, or owing debts to him, have been summoned as garnishees, it shall be the duty of the clerk of the court in which the suit is pending to give notice, by publication at least once in each week for three weeks successively, in some newspaper published in this State, most convenient to the place where the court is held, of such attachment or garnishment, and at whose suit, against whose estate, for what sum, and before what court the same is pending, and that unless the defendant shall appear, give bail, and plead within the time limited for his appearance in such case, judgment will be entered, and the estate so attached or garnisheed sold or otherwise disposed of as provided by law. And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact.

23. Default.] § 23. No default or proceeding shall be taken against any defendant not served with summons within the State and not appearing, unless the first publication or personal service outside of the State be at least thirty days prior to the day at which such default or proceeding is proposed to be taken.

24. Continuance for want of publication or service.] § 24. If for want of due publication or service the cause shall be continued, the same proceedings shall be had at

a subsequent return day to be fixed by the court, as might have been had at the return day at which the writ is returnable.

25. Filing of complaint — Answer or appearance — Time.] § 25. The complaint shall be filed ten days before the return day of the attachment, and if so filed the defendant, subject to the provisions of Section 10 of this Act,[1] shall file his answer or otherwise make his appearance on or before said day. If the complaint is not so filed the defendant shall not be compelled to appear or answer until fifteen days after the return day designated in the writ and if the complaint is not filed five days after the return day designated in the writ the defendant may, in the discretion of the court have the suit dismissed.

26. Civil Practice Act — Application.] § 26. The provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act.

27. Pleadings.] § 27. The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons.

28. Amendments.] § 28. [Omitted]

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1. Section 10 et seq. of this chapter.

29. Interpleading.] § 29. In all cases of attachment, any person, other than the defendant, claiming the property attached, or garnisheed may intervene, verifying his petition by affidavit, without giving bond, but such property shall not thereby be replevied; and the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of the property. In all cases where the jury finds for the claimant, and that such claimant is also entitled to the possession of all or any part of such property, the court shall enter judgment for such claimant accordingly and order the property attached or garnisheed to which such claimant is entitled to be delivered to such claimant, and the payment of his costs in such action. In cases where the jury finds for a claimant but further finds that such claimant is nott hen entitled to the possession of any such property such claimant shall be entitled to his costs; and where the jury finds for the plaintiff in the attachment, such plaintiff shall recover his cost against such claimant. If such claimant is a non-resident of the State he shall file security for costs as in the case of a non-resident plaintiff.

30. Counterclaim.] § 30. Any defendant against whom an attachment may be sued out under this Act, may avail himself in his defense of any counter-claim properly pleadable by the laws of this State.

31. § 31. Repealed]

31a. Change of parties—Other amendments.] § 31a. [Omitted]

32. § 32. Repealed]

33. Proceedings in aid.] § 33. Upon the return of attachments issued in aid of actions pending, unless it shall appear that the defendant or defendants have been served

with process in the original cause, notice of the pendency of the suit, and of the issue and levy of the attachment, shall be given as is required in cases of original attachment; and such notification shall be sufficient to entitle the plaintiff to judgment, and the right to proceed thereon against the property and estate attached, and against garnishees, in the same manner and with like effects as if the suit had been commenced by attachment.

34. Effect of judgment.] § 34. When the defendant has been served with the writ, or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons; and execution may issue thereon, not only against the property attached, but the other property of the defendant.

35. Judgment by default—Special execution.] § 35. When the defendant shall be notified as aforesaid, but not served with process within the State, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded upon to final judgment as in other cases of default, but in no case shall judgment be rendered against the defendant for a greater sum than appears, by the affidavit of the plaintiff, to have been due at the time of obtaining the attachment, with interest, damages and costs; and such judgment shall bind, and a special execution shall issue against the property, credits and effects attached, and no execution shall issue against any other property of the defendant; nor shall such judgment be any evidence of debt against the defendant in any subsequent suit.

36. Property levied upon.] § 36. [Omitted]

37. Division of proceeds—Priority.] § 37. [Omitted]

38. Statement of participating judgments—Officer to divide proceeds.] § 38. [Omitted]

39. Payment into court.] § 39. [Omitted]

39a. Sale of livestock levied upon.] § 39a. [Omitted]

40. Appeals.] § 40. The plaintiff or defendant in any attachment, person intervening, and the sheriff, or either of them, who may feel aggrieved by the final order or judgment of the court, may prosecute appeals as by law is provided in other civil cases.

41. Fraud.] § 41. This act shall be construed in all courts in the most liberal manner for the detection of fraud.

42. Repeal.] § 42. [Omitted]

43. Repealed]

44. Amendment to pleadings. § 44. [Omitted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-721

ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF
For Appellants Quern and O'Malley

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),

Attorney for Appellants, Quern and O'Malley.

PAUL J. BARGIEL,
PATRICIA ROSEN,
Assistant Attorneys General,
160 North LaSalle Street, Suite 800,
Chicago, Illinois 60601 (793-5635),

Of Counsel.

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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REPLY BRIEF
For Appellants Quern and O'Malley

APPELLANTS APPEAL FROM A FINAL ORDER WITHIN THE TIME PERMITTED BY STATUTE

The legislative history of the statutory provisions pertaining to three-judge district courts, 28 U.S.C. §§2281-84 [hereinafter three-judge court statutes], indicates that Congress devised the three-judge court statutory scheme in order to protect state and federal legislation from "improvident doom", on constitutional grounds, at the hands

of a single federal district court judge. *MTM, Inc.* v. *Baxley,* 420 U.S. 799, 804, 43 L. Ed. 2d 636 (1975).[1] It is submitted that due deference to the congressional intent underlying the enactment of the three-judge court statutes dictates that the permanent injunction which was entered by the three-judge court in this case, enjoining the enforcement of a state statute, was a final order which was directly appealable under §1253.

[1] As stated by the Senate Committee on the Judiciary, in its report that was dealing with the bill that was to become the Act of August 12, 1976 (S. Rep. No. 94-204, 94th Cong., 1st Sess., 1975, p. 2):

> "The provision for three-judge courts was enacted by Congress as a solution to a specific problem. In 1908, the Supreme Court, in the landmark decision of *Ex parte Young*, 209 U.S. 123 (1908), held that State officials could be enjoined by Federal courts from enforcing unconstitutional State statutes. The *Young* decision came at the turn of the century, at a time of vigorous expansion of big business and the railroads. As the States sought to exert control over these enterprises, they enacted regulatory statutes. Repeatedly, however, their attempts were thwarted by Federal court injunctions preventing enforcement of these statutes. Most controversial was the practice of many Federal judges of granting interlocutory injunctions on the strength of affidavits alone or of granting temporary restraining orders ex parte, i.e., without hearing or notice to the opposing side.
>
> "As a response, Congress enacted the Three-Judge Court Act (Act of June 18, 1910, ch. 309, §17, 36 Stat. 577) which prohibited a single Federal district court judge from issuing interlocutory injunctions against allegedly unconstitutional State statutes and required that cases seeking such injunctive relief be heard by a district court made up of three judges. The act also contained a provision for direct appeal to the Supreme Court in the belief that this would provide speedy review of these cases. The rationale of the act was that three judges would be less likely than one to exercise the Federal injunctive power imprudently. It was felt that the act would relieve the fears of the States that they would have important regulatory programs precipitously enjoined. . . .
>
> ". . . The original act dealt only with interlocutory, and not permanent injunctions. A 1925 amendment to the act required that three judges convene for permanent as well as interlocutory injunctions."

Recognizing the congressional intent underlying the three-judge court statutes, this Court has attempted to construe its jurisdiction under §1253 in a manner consistent with both the congressional policy favoring accelerated review of three-judge court orders granting or denying injunctive relief and the equally significant congressional concern for minimizing the Supreme Court's docket. *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 98-99, 42 L. Ed. 2d 249 (1974).

In *Goldstein* v. *Cox,* 396 U.S. 471, 90 S. Ct. 671 (1970), this Court held that its jurisdiction over interlocutory orders under §1253 "is confined to orders granting or denying a preliminary injunction." (*Goldstein,* 90 S. Ct. at 675). It follows that an interlocutory order granting a permanent injunction would not be appealable under this section. Thus, a determination by this Court that the order appealed from in this case is an interlocutory order would necessarily result in a finding that review under §1253 is not proper because the order entered here granted a permanent, rather than a preliminary, injunction. This interpretation leads to the incongruous result that *all* orders granting preliminary injunctions would be directly appealable under this section (since they are always interlocutory), but a significant number of orders granting permanent injunctions would be denied an accelerated determination simply because an ancillary claim is remanded to a single district judge for determination. Such a result is directly contrary to the congressional intent manifested in the enactment of the three-

judge court statutes. It is clear that an injunction granting permanent relief enjoining the operation of a state statute on constitutional grounds must necessarily have been final in its effect and could not have been awarded in the absence of a final determination on the merits in plaintiffs' favor.

It is submitted that the rule in *Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737, 47 L. Ed. 2d 435 (1976) is not applicable to this case. *Liberty Mutual* was not an appeal under §1253 and did not involve an order granting or denying a permanent injunction. Furthermore, if the order of the three-judge court in the instant case is not considered "final", the appellant will be faced with the anomaly of either a bifurcated appeal or the loss of the right to a direct appeal under §1253 since the "final" order would be entered by a single judge.

As noted by this Court in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 8 L. Ed. 2d 510, 524-25 (1962),

> * * * The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered "final." [citations] A pragmatic approach to the question of finality has been considered essential to the achievement of the "just, speedy, and inexpensive determination of every action": the touchstones of federal procedure.

While this Court has seldom considered the finality of an order under §1253 (*Brown Shoe, supra*), there have been numerous decisions discussing the finality of a state court order in appeals under §1257. See: *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 125-26, 89 L. Ed. 2092 (1944); *Mills* v. *Alabama,* 384 U.S. 214, 16 L. Ed. 2d 484 (1966); *Hudson Distributors Inc.* v. *Eli Lilly & Co.,* 377 U.S. 386, 12 L. Ed. 2d 394 (1964); *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U.S. 156, 38 L. Ed. 2d 379 (1973). This Court has noted that the finality requirement of §1257 serves several ends: avoidance of piecemeal review, avoidance of advisory opinions and promotion of minimum federal intrusion into state affairs. (*North Dakota State Bd. of Pharmacy,* 38 L. Ed. 2d at 383). However, this Court has also recognized that in some situations, where intermediate rulings "may carry serious public consequences," a departure from this requirement of finality for federal appellate jurisdiction is justified. (*Ibid.*) It is submitted that a consideration of the foregoing factors should result in a determination that this case is one which requires an immediate review.

Unlike the situation where this Court is asked to review an intermediate state court order under §1257, review under §1253 would serve to minimize federal intrusion into state affairs. Furthermore, the remaining claim does not raise any other federal questions which could be reviewed by this Court, so to allow review at this stage of the litigation will not offend the objection against fragmentary review. (*Radio Station WOW,* 89 L. Ed. at 2092). Therefore, the general requirement of finality for federal appellate review should not operate to deny an expedited determination of the ruling of the three-judge court in the instant case.

In *New York* v. *Cathedral Academy,* ..... U.S. ....., 54 L. Ed. 2d 346 (1977) this Court held that an order of the Court of Appeals of New York was final, despite the fact that the Court of Appeals had remanded the case to the Court of Claims for a determination of the amount of damages, based upon the fact that the decision of the Court of Appeals "finally determined the federal constitutional issue" (*Id.* 54 L. Ed. 2d at 351). Likewise, in this case there can be no doubt that the decision of the three-judge court

finally determined the federal constitutional issue involved in the litigation. Therefore, this Court should find that the order was directly appealable under §1253.

Finally, it is submitted that the order of the three-judge court entered in the instant case "had sufficient indicia of finality" for this Court to hold that this judgment is properly appealable.[2] This order contained a final determination that various sections of the Illinois Attachment Act are unconstitutional under the Fourteenth Amendment to the United States Constitution. County Defendants were ordered to return all property of plaintiffs and release all other property attached pursuant to this Act. All clerks were permanently enjoined from issuing writs of attachment and all sheriffs were likewise enjoined. The State defendants were enjoined from authorizing writs of attachment. (See: Jurisdictional Statement, p. A2). Each of the foregoing orders is final in nature and such orders could not have been entered unless the Court made a final determination that plaintiffs were correct on the merits of the constitutional claim. Under these circumstances, a remand of a claim for damages to a single district judge should not operate to deprive defendants of a direct appeal to this Court under §1253.

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[2] It is interesting to note that this Court previously heard argument in this case when it was in exactly the same posture. The order from which an appeal was taken in the instant case is the same order entered by the three-judge court in the original action on December 15, 1975. Defendants did not file their Notice of Appeal from the December 15, 1975 order until February 3, 1976 (50 days after the order was entered). The appeal was docketed on April 3, 1976, and probable jurisdiction was noted on September 7, 1976. The case was decided by this Court on May 31, 1977 without consideration of the question of whether this Court had jurisdiction to hear the appeal under §1253.

CONCLUSION

For the foregoing reasons, appellants believe that the questions presented by this appeal are substantial and of broad importance and application. Appellants, therefore, respectfully urge this Honorable Court to give this case its full consideration and reverse the district court's judgment.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),
Attorney for Appellants,
Quern and O'Malley.

PAUL J. BARGIEL,
PATRICIA ROSEN,
Assistant Attorneys General,
160 North LaSalle Street, Suite 800,
Chicago, Illinois 60601 (793-5635),
Of Counsel.

January 17, 1979